No. 91-1186

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WALKER BENNETT MONROE
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the district court violated the command of the Sentencing Reform Act of 1984 to avoid disparity between similarly situated defendants in determining it was powerless to depart to avoid a greater than ten-year disparity between similar defendants originally charged with and guilty of the same underlying misconduct?[1]

2. Whether to protect the Sixth Amendment right to jury trial the district court has the duty to state the reasons for a gross unexplained sentencing disparity, more than 10 years for the one who had a jury trial, between similarly situated defendants in the same case?[2]

[1] This question for review is repeated here, because the re-phrasing by the Government in its Brief in Opposition ("BO") mistakenly characterizes the error as the district court's "declining" to depart, when the real issue was the lack of power to depart. (Pet 5-6, 6 n.2, 20-21). Petitioner's question is directed at the avoidance of gross disparity (ten-year difference) and not equalization. (Pet 21-26).

[2] The duty to state reasons is not the same question as presented by the Government that the petitioner claimed the district court penalized him for the exercise of his right to trial by jury.

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REPLY BRIEF

The Petitioner, Walker Bennett Monroe, files this reply brief to correct the factual errors and misdirection of the issue by the Government's Brief in Opposition. The sentencing issue concerns exclusively the power of the district court to comply with the express statutory language of the Sentencing Reform Act of 1984 to avoid unwarranted disparities between defendants in the same case with similar backgrounds and convicted and sentenced on the

same conduct. The Congressional mandate was a necessary tool for the judges to achieve uniformity and fairness as a counterweight for the unchecked charging and bargaining discretion of the prosecutor. The power to depart to avoid gross disparity between similarly situated defendants is expressly conferred on sentencing judges, although they need not exercise it. The Sentencing Reform Act favors a statement of reasons for the sentence imposed, and when two defendants receive such disparate sentences for the same misconduct, a reasoned statement from the sentencing judge differentiating the two defendants so as to insure that the defendant was not sentenced more severely because he exercised his right to trial by jury is required.

STATEMENT OF THE CASE

McCabe and Monroe, petitioner, were sentenced for the same "conduct." The prosecutorial packaging did not undermine the truthful basis of both sentences -- the same marijuana transaction. McCabe did bargain and plead to

"an unrelated pre-Guidelines marijuana importation conspiracy count" (BO 3) or "fabricated" count (Pet 5). Although McCabe's exposure under this plea to the two counts was 19 years confinement (15 years for the pre-Guidelines marijuana conspiracy and four years for the Guidelines telephone count) (McCabe's PSR cover), his plea agreement which entailed no cooperation[3] limited his exposure to a range of 36 to 47 months. (22 May 89 RT 9). The transparency of the procedure was not lost on the Probation Officer who wrote McCabe's Presentence Report and expressly relied on the same misconduct that supported his joint charge with the petitioner and even calculated the offense under the Guidelines that would have resulted in a range of sentence of 262-327 months (21 5/6 years to 27 1/4 years). (McCabe PSR 17).[4]

[3] If McCabe cooperated with the Government, he may not have been similarly situated. Pet 17 n.7 In **Nelson** the court held that the district court had power to depart to avoid great disparity even when the co-defendants cooperated. Pet 23-24.

[4] It should be noted that this was the same sentence recommended by the Probation Officer for the petitioner. (Monroe PSR 21; BO 4).

The Government does not accurately characterize the sentences of McCabe and petitioner by stating: "who both were sentenced under the Guidelines...." (BO 7-8). This is a half-truth. McCabe's telephone count was under the Guidelines with a maximum sentence of 48 months, but McCabe was also sentenced for the pre-Guidelines "fabricated" marijuana conspiracy count (15-year maximum) so as to deliberately avoid the imposition of the same Guidelines sentence the petitioner faced. The bulk of McCabe's exposure was pre-Guidelines (15/19ths), and it would be more accurate to call it at least a mixed sentence or predominantly a pre-Guidelines sentence.

The joint case of petitioner and McCabe as charged in the same indictment was assigned to Judge Brewster, but he assigned the Monroe's case to Judge Keep for jury trial. (CR 94). Seven weeks after Judge Brewster sentenced McCabe, Judge Keep sentenced petitioner. (Pet 10, 15). In his sentencing memorandum and at sentencing petitioner's trial defense counsel placed heavy reliance on

the statutory provision mandating the sentencing court "to avoid unwarranted disparities among defendants with similar records who have been found guilty of similar conduct." (18 U.S.C. 3553(a)(6)). (Pet 13-17). Defense counsel requested the court consider the sentence of McCabe in granting a downward departure to avoid gross disparity between similarly situated defendants, but the court held she had no power to depart downward and even expressed that she believed the sentence "awful" and "unjust." (Pet 17-18).

REASONS FOR THE ALLOWANCE OF THE WRIT

A. THERE IS CONFLICT AND DISARRAY OF THE CIRCUITS ON THE POWER OF THE DISTRICT COURT TO DEPART TO AVOID GROSS SENTENCING DISPARITY FOR SIMILARLY SITUATED DEFENDANTS THAT SHOULD TO BE RESOLVED BY THIS COURT.

"A major goal of the [Sentencing Reform] Act was to reduce disparity in sentencing courts through a new system in which defendants with similar characteristics who committed similar crimes received similar sentences." This statement, made by the Chairman of the Sentencing

Commission, Circuit Judge Wilkins, and the General Counsel of the Sentencing Commission, was based upon one of the statutory provisions relied upon by petitioner imposing on the sentencing courts the duty to avoid unwarranted disparity between similarly situated defendants for similar conduct.[5] Congress did not only create this lofty aspiration for the Sentencing Commission (28 U.S.C. 991(b)(1)(b)) and the Guidelines (28 U.S.C. 994(f)) but placed an affirmative, specific, and mandatory duty on the sentencing judge, because "[t]he court in determining the particular sentence to be imposed shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct." 18 U.S.C. 3553(a)(6). (Empha-

[5] Wilkins and Steer, Relevant Conduct: The Cornerstone of the Federal Sentencing Guidelines, 41 S.C.L. Rev. 495 (1990) The authors relied on 28 U.S.C. 991(b)(1)(B). **Id** n. 3. That provision articulated as a major purpose of the Sentencing Commission: "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct...." 28 U.S.C. 991(b)(1)(B). A similar provision governs Guidelines. 28 U.S.C. 994(f). The petitioner specifically relies on 18 U.S.C. 3553(a)(6)[district court responsibility to avoid such disparities]. See Pet 5-6.

sis added). In a recent decision of this court, Justice White (in dissent) restated the clear purpose of this section:

> Subsection (a)(6) -- "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct" -- takes on added significance in judging the reasonableness of the extent of the departure. Congress intended appellate review under the new sentencing regime to guide and control the discretion long-reposed in the district courts towards the ultimate goal of sentencing reform: to promote fairness and rationality, and to reduce unwarranted disparity, in sentencing. **Williams v. United States**, ___ U.S. ___, 50 Crim. L. Rptr 2080, 2087 (9 Mar 92). (Emphasis added).

The petitioner seeks the implementation of the plain meeting of the pivotal statutory basis of the Sentencing Reform Act.

Congress never intended a Procrustean scheme that could be manipulated to do injustice or create gross disparities. Although Congress restricted but did not eliminate judicial discretion, it did abolish parole, a post-sentence procedure that mitigated the terms of confinement. The Congress did nothing to restrict open-ended discretion of the prosecutor, who resolves almost 90 % of

his cases through plea bargaining.[6] Congress did create the offsetting or balancing judicial discretion in unusual cases with 18 U.S.C. 3553(b) permitting departures.[7] Congress specifically directed the sentencing court in the individual case to avoid unwarranted disparities. The courts must respect the plain meaning of the statute. **Chapman v. United States**, 111 S.Ct. 1919 (1991)(enforcement of the plain meaning of "mixture" under the Sentencing Reform Act). For the court of appeals to say the district court did not have the power to grant a departure to correct the proscribed disparity is an abandonment of a mandated judicial responsibility.

The alpha and omega of this case is the statute, 18

[6] "Nevertheless, the political power of prosecutors and the fear of swamping the courts have largely immunized plea bargaining -- the most important part of the sentencing process -- from sentencing reform. The sentencing reform movement has not restricted sentencing discretion so much as it has transferred discretion from judges to prosecutors." Alschuler, The Failure of Sentencing Guidelines: A Plea for Less Aggregation, 58 U. of Chi. L. Rev. 901, 926 (1991). (Emphasis added).

[7] In **Williams v. United States**, ___ U.S. ___, 50 Crim. L. Rptr. 2080 (9 Mar 92), this court reviewed the scope of appellate review of a departure.

U.S.C. 3553(a)(6), and its two complementary provisions in Title 28, sections 991(b)(1)(B) and 994(f) (Pet 3). The Government's Brief does not mention them. The court below mentioned section 3553(a)(6) in a footnote (Pet App 11517 n. 11) and then found that McCabe and petitioner were not "similarly situated," "as they were not guilty of the same offenses." (Pet App 11517)(Emphasis added). The Government also focuses on "offenses." (BO 6). The statute refers to "conduct," and the "cornerstone" of the Guidelines is Relevant Offense Conduct,[8] a basis for the assessment of punishment not limited to the charged offense but including all relevant conduct. See Sentencing Guidelines §1B1.3 Relevant Conduct (Factors that Determine the Guideline). The Sentencing Guidelines, both by statute and under the guidelines are applicable to "conduct" so that manipulation of the "offenses" would not create artificial and arbitrary categories. "Conduct" was the star

[8] See Wilkins and Steer, Relevant Conduct: The Cornerstone of the Federal Guidelines, 41 S.C.L. Rev. 495 (1990).

which the judiciary must follow, and the court below lost its heading by construing "conduct" to mean "offenses" leading to an "awful" and "unjust" result incompatible with a straight forward reading of the statute.

That the "conduct" was the same cannot be challenged, for the description of the offenses in both the Presentence Report of McCabe and that of petitioner were virtually identical. (Pet 18-20). They had "similar records" for both were in Category I with zero points. (Pet 18).

Although the Government summarized petitioner's position in its statement (BO 4), it misconstrues the issue when it stated: "Petitioner first contends that he was entitled to a downward departure from his Guidelines sentence to avoid unwarranted disparity between his sentence and that of McCabe." (BO 6). The issue, more properly as stated in petitioner's Question Presented for Review, is that the district court and the appellate court held the judge was powerless to depart to avoid a gross disparity in the case before her. (Pet i, 5-6, 17, 20-21, 22).

The court below (Pet App 11518; BO 5) emphasized that the two defendants in the same case were sentenced by different judges albeit in the same courthouse. The Sentencing Reform Act was to develop uniformity of sentencing to avoid disparities that previously existed when defendants with similar records charged with similar conduct received substantially different sentences because of the particular judge before whom they appeared.[9] The broad discretion afforded under pre-Guidelines sentences made comparison between different judges impossible. The Sentencing Reform Act limited that judicial discretion so as to make the fortuitous selection of the particular judge mostly irrelevant. Judges are now to be sensitive to the sentences imposed by their brethren. The approxi-

[9] These were not defendants in different cases or in different courthouses. There is a difference from specific disparity as between the defendants in the same case, and general disparity between all defendants. The avoidance of specific disparity is the purpose and reason for the mandate ("shall") of 18 U.S.C. 3553(a)(6), and the avoidance of general disparity is the responsibility of the Sentencing Commission and the Guidelines as required by 28 U.S.C. 991(b)(1)(B) and 28 U.S.C. 994(f).

mately 30-40 minutes it would take to review a summary of the plea and sentencing proceedings and Presentence Report of McCabe, a co-defendant in the same case, would not have been an unreasonable burden for petitioner's trial judge, who heard the evidence and was familiar with the role of McCabe as well as the petitioner. It was the same prosecutor for both defendants in the same case. The minor administrative burden was not a sufficient excuse for refusing to compare two defendants in the same case in the same courthouse to avoid disparity. A different judge no longer justifies gross disparity.

Although the Government contends there is no conflict and disarray in the circuits (BO 7), it then cites the decision in **United States v. Gessa**, 944 F.2d 265 (6th Cir. 1991) (BO 7 n. 7). The panel in **Gessa** refused to follow the precedent of **United States v. Nelson**, 918 F.2d 1268 (6th Cir. 1990), which it noted had received favorable scholarly comment, because it believed it was bound by an earlier panel decision that held to the contrary. 918 F.2d at

1270.[10] The **Gessa** panel and the panel below confused the avoidance of unwarranted (gross) disparity (the language of the statute) with the concept of equalization, which concepts are both qualitatively and quantitatively different. Unwarranted disparity is a recognition that while defendants in the same case and in the same categories may not necessarily be entitled to the same sentence, gross sentence differentials must be explained. Equalization rests on the claim for the same sentences by similar situated defendants in the same case. Petitioner does not claim the right to have the same sentence as McCabe, 38 months, but seeks recognition of the district court's power to depart downward from his 14-year sentence so as to avoid unwarranted disparity with the sentence previously imposed on McCabe. The amount of the departure would

[10] The court of appeals by taking the **Gessa** case en banc vacated this opinion (944 F.2d at 271), which was a precedent inconsistent with **Nelson**.

rest with the discretion of the sentencing judge.[11]

When the Chairman of the Sentencing Commission recognized the obvious split in the circuits concerning the power of the district court to depart to avoid unwarranted disparity (Pet 23), it was not a dispute as to dicta (BO 7), but a fundamental issue under the Sentencing Reform Act that must be resolved by this court.

Prior to the decision in petitioner's case the Ninth Circuit held that a basis for departure existed to avoid unwarranted gross disparity when defendants in the same case are fortuitously sentenced both Pre- and Post-Guidelines (Pet 24-25; BO 7). The Government attempts to distinguish the applicability of that established circuit precedent to his case, because both he and McCabe "were sentenced under the Guidelines." (BO 8). To label

[11] If the district court held that it had the power of departure and chose not to exercise it or departed less that requested by the defendant, that determination under the law of the Ninth and other circuits is unreviewable. (Pet 6 n. 2). If the court granted a departure it would be subject to appellate review. 18 U.S.C. 3742(b). See **Williams**, n. 7, **supra**.

McCabe's sentence as under the Guidelines is erroneous, for although the "relatively minor drug offense" (BO 6), the phone count, was under the Guidelines, the conspiracy to import marijuana was pre-Guidelines with a 15-year maximum sentence. McCabe's real sentence was pre-Guidelines, and precisely the case in which the prior Ninth Circuit precedent should have been applied. Since the defendant was denied the application of that precedent, this Court, as an alternative to full review of the issue, should at least grant certiorari, vacate the sentence, and remand to the Ninth Circuit for consideration of the sentence in light of **United States v. Ray**, 930 F.2d 1368 (9th Cir.), **cert. denied**, 111 S.Ct. 1084 (1991).[12] This Court has a supervisory responsibility over federal courts and a responsibility

[12] Much like the Sentencing Reform Act attempts to reduce the arbitrariness of sentence because of the individual judge, the petitioner seeks due process in requiring the panel below to follow its own law of prior precedent and not have the appellate sentencing outcome arbitrarily depend upon the particular panel deciding the case. The panel in petitioner's case cited **Ray** to oppose equalization but never mentioned the result and the approval of a departure for a defendant sentenced Post-Guidelines when co-defendants were sentenced pre-Guidelines. (Pet 24-25).

for action when there exists such divided opinion in the circuit. **United States ex rel. Robinson v. Johnston**, 316 U.S. 649 (1942).[13]

B. TO PROTECT THE SIXTH AMENDMENT RIGHT TO JURY TRIAL THE DISTRICT COURT HAS THE DUTY TO STATE THE REASONS AS TO A GROSS UNEXPLAINED SENTENCING DISPARITY, MORE THAN 10 YEARS FOR THE ONE WHO HAD A JURY TRIAL, BETWEEN SIMILARLY SITUATED DEFENDANTS IN THE SAME CASE.

The Government errs when it contends that the Sentencing Guidelines obviated the need to explain the substantial difference in sentences of defendants in the same case where those who went to trial received much larger sentences. The Guidelines do not permit punishment for the exercise of the Sixth Amendment right to jury trial. The defendant who insists on the right to trial (as did petitioner) cannot be subjected to harsher punishment

[13] This is not a case of a certified question to this court as in **Wisniewski v. United States**, 353 U.S. 901 (1957)(BO 8), or a separate mandamus action requesting extraordinary relief as in **In re Blodgett**, 112 S.Ct. 674 (1992). The petitioner had filed both a request for rehearing en banc and a subsequent out-of-time request for rehearing en banc citing later precedent and again relying on **Ray**, but both were denied.

under the Guidelines than one who is similarly situated and makes a deal with the prosecutor for a basically pre-Guidelines plea and sentence. The federal courts have a supervisory responsibility to protect against such manipulation with a simple statement of reasons.

CONCLUSION

Because of the proliferating split of the circuits on an important sentencing question and the need to protect the Sixth Amendment right to jury trial, the petitioner requests that this court grant a writ of certiorari and decide the questions, or in the alternative, remand the case to the Ninth Circuit for an en banc review to resolve the intra-circuit inconsistencies or reconsideration in light of **United States v. Ray**, 930 F.2d 1368 (9th Cir. 1991).

Respectfully submitted,

DATED: 25 March 1992

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